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In The

Supreme Court of the United States

October Term, 1948

No. 27

AMERICAN FEDERATION OF LABOR, ARIZONA STATE FEDERATION OF LABOR, PHOENIX BUILDING AND CONSTRUCTION TRADES COUNCIL, ET AL., Appellants,

vs.

AMERICAN SASH & DOOR COMPANY, D. A. BREWER, W. B. STEVENS, ET AL.

Appeal from the Supreme Court of the State of Arizona

No. 47

LINCOLN FEDERAL LABOR UNION NO. 19129, AMERICAN FEDERATION OF LABOR, NEBRASKA STATE FEDERATION OF LABOR, ET AL., Appellants,

vs.

NORTHWESTERN IRON AND METAL COMPANY, DAN GIEBELHOUSE, STATE OF NEBRASKA and NEBRASKA SMALL BUSINESS MEN'S ASSOCIATION

Appeal from the Supreme Court of the State of Nebraska

No. 34

GEORGE WHITAKER, A. M. DEBRUHL, T. G. EMBLER, ET AL., Appellants,

vs.

STATE OF NORTH CAROLINA

Appeal from the Supreme Court of the State of North Carolina

BRIEF AMICUS CURIAE OF THE STATES OF MICHIGAN, NORTH DAKOTA, TENNESSEE, UTAH, FLORIDA, and WISCONSIN

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The issues presented in this cause are deemed to be of importance to each of the other states as well as to the states of Arizona, Nebraska, and North Carolina; even to states which may not have the kind of legislation which is under review. The same principles of law which are brought into play with respect to the right-to-work amendment to the constitutions of the three states named will be applicable to

legislation of other states which involves employer-employee relations.

It is our understanding that the constitutionality of the amendment involved in these cases, which provide in general that no person shall be denied employment because of membership or lack of membership in a labor organization, is being challenged on the asserted ground that it violates the appellants' constitutional rights. That constitutes, in essence, an assertion by the appellants of an inalienable right under the constitution to prevent persons who are not members of their organizations from pursuing their chosen method of earning a livelihood. Such an asserted right must lie at the base of a challenge to the constitutionality of the right-to-work amendments, because "He who would successfully assail a law as unconstitutional must come showing that the feature of the act complained of operates to deprive him of some constitutional right." *Aikens v. Kingsbury*, (1918) 247 U. S. 484, 489, 38 S. Ct. 558, 62 L. ed. 1226. In order to make a case, a party can not "assert the constitutional rights" of another. *Newark Natural Gas & Fuel Co. v. Newark*, (1917) 242 U. S. 405, 37 S. Ct. 156, 61 L. ed. 393.

The appellants have come full circle from the case of *Allgeyer v. Louisiana*, (1897) 165 U. S. 578, 589-590, 17 S. Ct. 427, 41 L. ed. 832, in asserting for themselves a constitutional right to deprive employees of rights guaranteed to the latter by the constitution. In the foregoing case the court said:

> "* * * The liberty mentioned in that amendment [The 14th] means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace

the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned.

"It was said by Mr. Justice Bradley, in *Butchers' Union Company v. Crescent City Company*, 111 U. S. 746, 762, in the course of his concurring opinion in that case, that 'The right to follow any of the common occupations of life is an inalienable right. It was formulated as such under the phrase "pursuit of happiness" in the Declaration of Independence; which commenced with the fundamental proposition that "all men are created equal, that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty and the pursuit of happiness." This right is a large ingredient in the civil liberty of the citizen.' Again, on page 764, the learned justice said: 'I hold that the liberty of pursuit—the right to follow any of the ordinary callings of life—is one of the privileges of a citizen of the United States.' And again on page 765: 'But if it does not abridge the privileges and immunities of a citizen of the United States to prohibit him from pursuing his chosen calling, and giving to others the exclusive right of pursuing it, it certainly does deprive him (to a certain extent) of his liberty; for it takes from him the freedom of adopting and following the pursuit which he prefers; which, as already intimated, is a material part of the liberty of the citizen.' It is true that these remarks were made in regard to questions of monopoly, but they well describe the rights which are covered by the word 'liberty' as contained in the Fourteenth Amendment."

The purpose of the guarantee of human rights under the constitution is to protect each individual in his personal liberty, rather than to assure to him any power over the liberty of others. The two foregoing objectives are irreconcilable, and utterly impossible of attainment together.

Individual rights may be as thoroughly destroyed, for all practical purposes, by coalitions or monopolies formed by private interests as they can by government. Surely it it would be futile and anomalous to construe the constitution as prohibiting government from infringing upon the right of individuals and at the same time to hold that the same constitution guarantees to private interests a right denied to government.

It was pointed out by this court in *Palko v. Connecticut*, (1937) 302 U. S. 319, 326, 58 S. Ct. 149, 82 L. ed. 288 that the rights guaranteed by the Fourteenth Amendment against infringement through state legislation are only those rights of the common law of so fundamental a nature that "neither liberty nor justice would exist if they are sacrificed." The court said:

> "We reach a different plane of social and moral values when we pass to the privileges and immunities that have been taken over from the earlier articles of the federal bill of rights and brought within the Fourteenth Amendment by a process of absorption. These in their origin were effective against the federal government alone. If the Fourteenth Amendment has absorbed them, the process of absorption has had its source in the belief that neither liberty nor justice would exist if they were sacrificed. *Twining v. New Jersey*, supra, p. 99. * * *"

In the words of the court in that case, p. 328, the test with respect to the constitutionality of any specific legislation is:

> "Does it violate those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions'."

Surely the right of an organization to compel citizens of the United States to join its ranks in order to have the privilege of earning a livelihood is not a right grounded in the fundamental principles of liberty and justice protected by the constitution, but rather it is an arrogation of privilege which would have the tendency to defeat such a right in others.

Were state government to enact legislation providing that no person could be employed within its boundaries unless he should become affiliated with, and pay tribute to, a particular organization, such legislation would, we believe, be prohibited by the Fourteenth Amendment as an abridgment of the individual's right "to live and work where he will; to earn his livelihood by any lawful calling," recognized in *Allgeyer v. Louisiana, supra.* Surely a state may make laws for the practical protection of individual rights recognized by the constitution. The infringement of individual rights by private interests is, in the absence of legislation to the contrary, lawful; but that does not mean the constitution guarantees a perpetual continuance of that circumstance. The fact that the constitution does not of itself *prohibit* the appellants from overriding the rights of others should not be translated into a constitutional guarantee that they are immune from legislative regulation.

The purpose of the constitution is served, rather than infringed, when the legislature acts to protect the right of an individual, which the government itself could not violate, from violation by others. It was pointed out in *Nebbia v. New York*, (1933) 291 U. S. 502, 538-539, 54 S. Ct. 505, 78 L. ed. 940, 89 A. L. R. 1469, that:

> "* * * The Constitution does not secure to anyone liberty to conduct his business in such fashion as to inflict injury upon the public at large, or upon any substantial group of the people. * * *"

This court held in *Railway Mail Assn. v. Corsi*, (1945) 326 U. S. 88, 65 S. Ct. 1483, 89 L. ed. 2072, that the constitution does not preclude regulation of labor organizations so as to prevent them from denying to individuals rights affecting their ability to earn a livelihood.

The legislation in the foregoing case prohibited unions from excluding individuals from *membership* because of race, creed or color. The legislation here involved prevents exclusion of individuals from *jobs* because of lack of union membership. The objective in both cases is to preserve to the individual free access to jobs. Surely, if a legislature may regulate the internal affairs of a union to the extent of proscribing exclusions from membership, it may regulate *to the same end* by proscribing such an organization from establishing a monopoly of jobs so as to prevent non-members from free access to a means of livelihood. We believe that what was said in the foregoing case with respect to state legislation directed toward preventing discrimination based on race, creed or color is equally applicable to legislation preventing discrimination based on non-membership in a particular labor organization. The same principle there

enunciated could be applied to the present situation with very slight change in wording:

> * * * A judicial determination that such legislation violated the Fourteenth Amendment would be a *distortion of the policy manifested in that amendment*, which was adopted to prevent state legislation designed to perpetuate discrimination * * *. We see no constitutional basis for the contention that a state cannot protect workers from exclusion * * * [from jobs] solely on the basis of * * * [non-membership in a particular group,] by an organization, functioning under the protection of the state, which holds itself out to represent the general business needs of employees. (cf. 326 U. S. pp. 93-94) (Emphasis added.)

Respectfully submitted,

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See also:

335 U.S. 525
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